

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1336

To be argued by
ROY M. COHN and MICHAEL ROSEN

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT COURT

UNITED STATES OF AMERICA,

Appellee,

- against -

JOSEPH GAMBINO and
CARLO CONTI,

Defendants-Appellants.

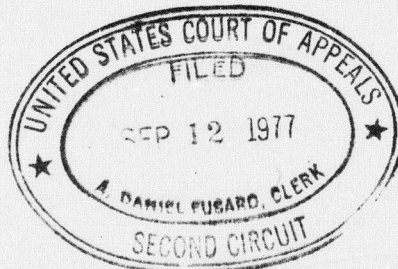
ON APPEAL FROM JUDGMENTS OF CONVICTION
FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT BRIEF OF APPELLANTS

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ISSUES PRESENTED

1. Whether the government failed to prove the participation of one appellant in the alleged conspiracy.
2. Whether the government may prove a defendant's participation in the conspiracy by innuendo and inference where there is no evidence that one of the appellants adopted or participated in any illegal plan.
3. Whether the reacquisition of appellants' own waste removal "stops" from Terminal Sanitation can constitute a violation of 18 U.S.C. §1962(b).
4. Whether a defendant can be guilty of "extortion" (as that term is defined by 18 U.S.C. §1951) when the only property "surrendered" by the alleged victims belonged to and constituted a legal right of the appellants.
5. Whether the court below erred in attributing certain unrelated testimony to an alleged violation of 18 U.S.C. §894.
6. Whether the testimony of a witness who admittedly was unaware of the nature of the relationship between the appellants and the alleged victims constituted sufficient corroboration of the testimony of the alleged victims when the court below found that without corroboration of the "victims'" testimony, no conviction could be had.
7. Whether a conviction may be properly found when the crucial jurisdictional element was supplied solely by the government.
8. Whether a defendant can be said to attempt to interfere with interstate commerce when the operation which is allegedly affected was never intended to operate as a commercial enterprise.
9. Whether a defendant can extort or attempt to extort money or property from the United States government.

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SECOND CIRCUIT COURT

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UNITED STATES OF AMERICA,

Appellee,

- against -

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Defendants-Appellants.
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BRIEF ON BEHALF OF
DEFENDANTS-APPELLANTS

PRELIMINARY STATEMENT

This brief is submitted on behalf of the defendants-appellants from the judgment of conviction entered after a non-jury trial in the United States District Court for the Southern District of New York (Honorable Robert J. Ward, Judge). The appellants were charged in a multi-count indictment as follows:

Count 1 - 18 U.S.C. §371 - Conspiracy

Count 2 - 18 U.S.C. §1962(b) and 2 - Anti-Racketeering

Counts 3 and 5 - 18 U.S.C. §1951 and 2 - Hobbs Act

Count 4 - 18 U.S.C. §894 - Extortionate Collection
of Credit

Counts 6-11 - 26 U.S.C. §7201 - Tax Evasion (only
as to appellant Gambino)

Counts 12-16 - 26 U.S.C. §7206 - Filing false tax
statement (only as to appellant Gambino)

Counts 17-22 - 18 U.S.C. §2 - Aiding and abetting
Gambino as to Counts 6-11 (only as to appellant
Conti)

Counts 17-22 were dismissed during trial. Upon the close of the trial, the appellants were each found guilty of Counts 1, 2, 3 and 4, while Conti was also found guilty of an attempt to violate 18 U.S.C. §1951 as to Count 5. Gambino was acquitted on Counts 5, 10 and 15, but was also found guilty of tax evasion for the years 1970-1973 and 1975 (Counts 6-9 and 11)*. No verdict was rendered on Counts 12-14 and 16. Appellant Gambino was sentenced to a total of 10 years in prison and fined \$50,000 , while Conti was sentenced to eight years imprisonment.

* We will not set forth a separate argument as to the tax evasion counts. However, should this Court determine that the convictions on the other counts should be reversed, the tax evasion counts would have to fall in that the allegedly unreported income stemmed from profits from alleged crimes as set forth in Counts 1-4.

STATEMENT OF FACTS

In late 1968, Joseph Gambino and Carlo Conti formed Columbus Leasing Corporation (hereinafter Columbus) with Gambino as President and a 2/3 stockholder, and Conti as Secretary-Treasurer and 1/3 stockholder. The equipment for this corporation was purchased from James Plastina and Columbus continued to do Plastina's waste removal operations under an agreement which terminated in late 1969.

At approximately this time, Yellow Bird Carting, Inc. (hereinafter Yellow Bird) was organized with Conti as its president (Tr. 117)*

In late 1969 or early 1970 Yellow Bird began picking up refuse from the Riverview Cooperative (hereinafter the Co-op Supremarket), which then was temporarily located in the garage in the then new Co-op City. There was evidence offered by the government and controverted by the defense that this customer was obtained following an incident at the Co-op Supremarket in 1969 during which Conti allegedly assaulted one Louis Mongelli with a lead pipe (Tr. 2485). Mr. Mongelli was called by the defense and testified that this supermarket wasn't one of his customers (Tr. 2405) and had received the alleged injuries not from Conti but had sustained them in an industrial accident. Gambino, however, never slapped Mongelli, nor was it ever alleged by the government that he participated in or precipitated this alleged incident.

* References denoted "Tr." refer to Trial Transcript.

In order to qualify for a carting license from the City of New York, it is necessary that a private sanitation firm have a sufficient number of customers. A customer in the sanitation industry is known as a "stop." In or about June, 1970, in an attempt to obtain this aforementioned license from New York City, Yellow Bird Carting, Inc. entered into an agreement with Terminal Sanitation, then a partnership operated by Peter Darminio and his brother, Anthony Darminio.

However, Yellow Bird was refused a license by the Department of Consumer Affairs of the City of New York (Tr. 1182).

Sometime in 1970, after the denial of Yellow Bird's license application, Joseph Gambino spoke with Peter Darminio of the Terminal firm and inquired as to whether he (Darminio) would be interested in purchasing the stops that Yellow Bird had hoped to serve had its license request been approved. An agreement in principle was reached between Gambino and Peter Darminio whereby Gambino was to receive 1/3 of the income from these purchased stops and Darminio would receive 2/3 of the income (Tr. 119).

Thereafter, in April, 1971, a contract (Government Exhibit 7) was entered into between Yellow Bird and Terminal which provided that Terminal would purchase the stops that Yellow Bird was successful in soliciting but could not serve because it was unsuccessful in obtaining the carting license. This agreement provided that Terminal would purchase Yellow Bird's stops primarily in Co-op City in the Bronx, including

the Co-op Supremarket. In addition to two initial down payments, Peter Darminio was to make monthly payments for the purchase of these stops by Gambino of approximately \$800 per month to pay off the notes between Terminal and Yellow Bird. The balance of the 1/3 payment was to be paid to Gambino in cash (Tr. 127). Initially, these payments were made directly by Peter Darminio to Joseph Gambino. However, after the stops had been sold to Terminal, Carlo Conti, formerly President of Yellow Bird, became an employee of Terminal and often collected the payment owed by Peter Darminio to Gambino.

Peter Darminio was in fact a gambler and in the early 1970s was arrested on narcotics charges and was subsequently indicted in Rockland County in the state of New York. His brother, Anthony, was an admitted heroin user and had in fact been tried and convicted for the sale of narcotics and was incarcerated for almost a year until the government "assisted" in arranging his work release prior to the commencement of this trial, despite the fact that he was facing a potential life sentence in jail.

As a result of the Darminio brothers'"extra curricular activities" they were constantly short of money and made it a regular habit of not being able to meet their business or personal obligations, including the payment of salaries and tapes. Between them, the Darminios borrowed a considerable amount of money from Gambino during the years 1970 and 1971. As a matter of fact, in 1971, in order to repay these outstanding

loans, Terminal Sanitation sold one of its stops and the Darminics' loans to Gambino were repaid from the proceeds of the sale (Tr. 192). Thus, the funds advanced by Gambino to the Darminios in 1970 and 1971 were repaid to Mr. Gambino without any interest charged by Mr. Gambino. However, during the period 1972 through 1975, Peter Darminio was again frequently in arrears in connection with the payments of various and numerous debts; including the one-third payments that were due and owing Gambino on the former Yellow Bird stops.

In early 1972, Gambino formed the Blue Grass Carting Company and on February 26, 1972 entered into a contract to purchase from Terminal, the Co-op City stops, including the Co-op Supermarket (Tr. 170). These stops included most of the stops set forth in the April, 1971 contract between Terminal and Yellow Bird.

In connection with this Terminal-Blue Grass contract, Gambino gave Peter Darminio a deposit in the form of a check for \$7,000. When Gambino was unable to obtain a carting license from the City of New York the agreement was cancelled and the deposit returned to Gambino. This was accepted as a working arrangement within the waste removal industry.

However, as had been the case in the past, Peter Darminio continued to require monies to cover his expenses, both personal and business, and in August or September, 1972 borrowed certain additional monies from Gambino (Tr. 214).

In April, 1973 another contract was entered into by Terminal, this time with Country Club Carting, a newly formed company which was to be operated by Gambino's wife, Rosalie, and her father, Nicholas R. Lentini (Tr. 170). A \$12,000 deposit was given and the defense offered testimony by both Nicholas Lentini and his wife, Angela, that they supplied \$10,000 of this \$12,000 deposit out of a dreyfus Fund in order to form and operate Country Club Carting (Tr. 2509). However the City of New York again refused to issue the appropriate license and the contract was cancelled.

In July of 1973, Bernard Ettinger, who had sold Terminal to the Darminios in 1968 and who had not been paid in full in connection with the sale, made a complaint in writing (Government Exhibit 17) to the New York City Department of Consumer Affairs requesting that the Department see to it that the Darminios fulfilled their contractual obligations to him before the Department approved any sale of stops registered to Terminal (Tr. 1215). As a matter of fact, Mr. Ettinger had had trouble receiving the monies owed to him by the Darminios ever since 1971, which was two years prior to his complaint (Tr. 1213).

Thereafter, Carlo Conti allegedly visited Ettinger's office in the Bronx, slapped Ettinger and proceeded to tell him that it would be better not to complaint to the Department of Consumer Affairs (Tr. 1219). Ettinger did not call the Department of Consumer Affairs (Tr. 1220). There was no

evidence offered to show that Conti did this to gain any advantage. The various benefits provided by Gambino and Conti to the Darminios were entirely inconsistent with the government's theory and remain unexplained to this day.

In 1974, there came a time when Ettinger pressed Peter Darminio for payment which was due on the 1968 sale by Ettinger to the Darminios. According to Ettinger's testimony, the balance then due was approximately \$90,000 (Tr. 1223-4). Shortly thereafter, Peter Darminio came to Ettinger's office along with Joseph Perillo, owner of Du-Rite Sanitation (at one time known as Perillo Sanitation), who was prepared to purchase some stops from Terminal. Gambino was also present at this meeting.

The stops Perillo was to purchase were not in Co-op City but in the Castle Hill Avenue area of the Bronx (Tr. 1696). During the course of this meeting, Gambino indicated that if Ettinger would take less (money) there would be enough stops for Peter Darminio to continue to "make a living" (Tr. 1226). Mr. Ettinger agreed to settle for \$40,000 but insisted on a down payment that day because he had not received money a deal had been negotiated for some time (Tr. 1698), and Ettinger was threatening to foreclose on Anthony Darminio's house unless he received some money (Tr. 1721). Perillo, however, did not have any money with him so Gambino thereupon gave Perillo \$5,000, which Perillo in turn gave to Ettinger. Perillo paid Gambino back a short time later; within three or

four days (Tr. 1710). At no time during this meeting did Joseph Gambino ever threaten anyone (Tr. 1226).

During the remainder of the years 1974-5, Terminal's business continued to decline. In November of 1975, a contract was entered into between Terminal and P & S Sanitation, a newly formed corporation (Tr. 172). Anthony Sepe was President of this company which was to be run by Conti, who was Sepe's brother-in-law. Pursuant to this contract of November, 1975, P & S acquired Terminal's Co-op City stops, servicing the same Co-op City stops which Terminal had previously serviced, including Harry's Service Station, located at 1000 Baychester Avenue, Bronx, New York.

In the fall of 1976, the Federal Bureau of Investigation incorporated American Automated Refuse and Waste Removal, Inc., and set up an office at 80 Westchester Square in the Bronx (Tr. 1339).

This corporation set up by the government began to acquire equipment to be used in waste removal, including trucks from the U.S. Army and a winch and began soliciting accounts. It must be noted that this company was set up with the express intent to do investigative work rather than to seriously participate in the waste removal business (Tr. 1377, 1954).

After this investigation was completed American Automated was to be disbanded and go out of business (Tr. 1531). American solicited Harry's Service Station although the government was aware that P & S was then servicing this account

(Tr. 1978, 79, 81). On December 1, 1976, Harry's entered into an agreement with American, the government operated company, and arrangements were made for American to drop off a container at Harry's. The container was used to store waste which would then be removed by American.

On December 15, 1976, Conti telephoned American and followed this phone call with a visit to American's office at 80 Westchester Square in the Bronx, New York. He entered the office and allegedly proceeded to threaten a person named Wayne Dacon, but who was in fact Walter Wayne Orrell, a Special Agent of the F.B. I. (Tr. 1345). Special Agent Orrell testified during the trial that he thought that there could be a confrontation with Mr. Conti with every stop that American solicited (Tr. 1403). The alleged threat included a threat to throw Orrell from the window. The conversation between Special Agent Orrell and Conti was tape recorded and the tape was received in evidence (Government Exhibit 31) and heard by the court. Moreover, Agent Orrell testified that on two occasions that day he was physically assaulted by Mr. Conti.

Conti, during this conversation, indicated that he was not happy with American's solicitation of Harry's Service Station and implied during this conversation that Co-op City belonged to him. He insisted that American's container be removed from Harry's immediately. At no time was Gambino present during this meeting.

POINT 1

THE GOVERNMENT FAILED TO PROVE A CONSPIRACY
AS TO COUNT 1 OR A VIOLATION OF 18 U.S.C.
§1962(b) UNDER COUNT 2.

The first count of the indictment herein charges the appellants with conspiring to violate 18 U.S.C. §§894, 1951, 1962(b) and 1962(c). It is the appellants' position that the evidence adduced by the government at trial fell far short of the requisite proof needed to show beyond a reasonable doubt that a conspiracy existed. Chronologically, the earliest alleged act of the appellants was Conti's supposed assault on Louis Mongelli in 1969. Even if we assume that Conti did in fact assault Mongelli (although Mongelli himself testified that Conti did not assault him), unquestionably there was no evidence linking Gambino to this alleged assault. The final act in this drama was the American Automated incident of December, 1976, in which the Court found Gambino was not involved whether as a principal or as an aider and abettor and therefore not guilty. Thus we are faced with a situation wherein although a conspiracy conviction has been found, one of the two alleged co-conspirators was not involved either at the beginning of the crucial series of events or at the end.

The critical testimony on the part of the government came from the Darminio brothers, Peter and Anthony. However, it must be pointed out that the court hesitated to credit the testimony of the Darminios without corroboration by one Ralph Torres, a former employee of Terminal Sanitation (Tr. 2922).

In fact, without Torres, the government did not have a case.

At the time of sentencing, Judge Ward found that:

"Mr. Torres' testimony corroborated the testimony of the Darminios. I would suggest that without corroboration I was not prepared to believe the oral testimony of both of the Darminios as proving the government's case beyond a reasonable doubt." (Tr. 3066).

The Darminios were certainly not pillars of society. Peter Darminio admitted to not filing business tax returns for three years (299,304) and continually took money from Terminal to support his gambling habit and high standard of living (Tr. 384, 405,513). Anthony Darminio admitted to a serious heroin habit (Tr. 321). Furthermore both brothers conceded that they constantly lied to each other (Tr. 322, 1083, 1084).

Against this background the government asked the court below to find a conspiracy between Conti and Gambino. Much of the testimony concerned Hobbs Act and Anti-Racketeering Act violations as well as the conspiracy. Significantly, however, there was little direct testimony linking Gambino to any conspiracy.* The government's theory was that while Conti was the "enforcer" in the operation, Gambino was the "power" behind the whole operation. There was, we submit, no direct testimony as to this, and the circumstantial evidence of Gambino's involvement in any conspiracy was weak at best.

* Obviously, if Gambino were not a member of a conspiracy, Count 1 would, of necessity, fall as to both appellants.

Initially, it was the government's obligation to demonstrate that an agreement had been reached between Gambino and Conti. United States v. Silva, 131 F.2d 247 (2nd Cir. 1942). This was an essential element of the government's case. United States v. Armone, 363 F.2d 385 (2nd Cir., 1966), cert. den. 385 U.S. 957, 87 S.Ct. 391, 392, 398, 17 L.Ed. 2d 303 (three cases). The evidence showed that Gambino did not participate in any violence or threats. The Co-op City stops were his throughout this period of time. Even the Darminios admitted this (Tr.445,465,563). Thus there could be no conspiracy to violate 18 U.S.C. §1951 as the Darminios could not be extorted if Gambino already owned the property.* Similarly if the stops which P & S Sanitation eventually serviced in 1975 in Co-op City always belonged to Gambino, the appellants could not be guilty of conspiring to acquire enterprise through racketeering activities. (18 U.S.C. §1962(b)). If the evidence failed to show that a conspiracy existed to maintain Terminal through racketeering activities and to use extortionate means, no conviction under 18 U.S.C. § 371 could be sustained.

If we accept the testimony in a light most favorable to the government, very little evidence directly involves Gambino. With one exception, no physical violence was perpetrated by Gambino. As will be shown, this one incident is not enough to convict him of participation in the conspiracy.

* The issue of alleged Hobbs Act violations will be a separate point infra.

Even if we assume that Conti performed the acts of violence testified to by the Darminios, this does not show an agreement between Conti and Gambino for criminal purposes. Gambino's knowledge of Conti's actions would not create a conspiracy. Neither association with conspirators nor knowledge that something illegal is going to constitute proof of participation in a conspiracy. United States v. Webb, 359 F.2d 558 (6th Cir. 1966), cert den. 385 U.S. 824, 87 S.Ct. 55, 17 L.Ed.2d 61; United States v. Keach, 480 F.2d 1274 (10th Cir. 1973). Although circumstantial evidence may be sufficient to show a conspiracy, it must be such as would establish beyond a reasonable doubt that Gambino agreed to or participated in a plan to violate the law. United States v. Webb, supra.

The record clearly indicates that Conti was a man of the streets not schooled in the subtlties of business. He struggled to survive in a hard and demanding business, and perhaps, at times reacted violently. Yet this attitude cannot be said to spill over to Gambino. In dealing with the Co-op City stops or in the repayment of loans, any alleged violence did not stem from Gambino. Nor did the government show any agreement with Conti or instructions to Conti that he should employ violence.

The one incident of violence attributed to Gambino was an isolated incident of alleged assault upon Peter Darminio. In the case of United States v. Amato, 495 F.2d 545 (5th Cir. 1974), the conviction of one defendant, Brunello, was reversed.

There the court found that although Brunello was "an active aggressor" in an assault, this lone incident was insufficient to prove his entry into or participation in a conspiracy. We believe that to this juncture the government had failed to prove the existence of a conspiracy. A more detailed analysis of the separate allegations of Count 1 show that there was unquestionably no conspiracy.

In essence Count 1 was broken down into four parts:

(a) the acquisition and maintenance, through a pattern of racketeering activity, of an interest in and control of Terminal Sanitation;

(b) the acquisition and maintenance, through a pattern of racketeering activity, of an interest in and control of the business assets and contractual rights of Terminal;

(c) the acquisition and maintenance, through a pattern of racketeering activity, of control of refuse removal in the Co-op City area and other areas of the Bronx; and

(d) the conduct and participation in the affairs of P & S Sanitation through a pattern of racketeering activity.

(a) The proof at trial failed to show a conspiracy between the appellants for the purposes enumerated above. Even accepting the government's proof in its most favorable light to the government, there was no proof that Gambino and Conti conspired to acquire and maintain an interest in and control of Terminal. In fact the appellants' conduct and actions were in no way referable to a design or plan to secure

any interest in Terminal's business other than the receipt of funds for those stops which the Darminios conceded never belonged to them or Terminal. At best the government's proof showed that from 1971 through 1975 Terminal had been servicing certain accounts transferred to it by Yellow Bird, retaining 2/3 of the proceeds of those accounts and remitting 1/3 to the transferors. This activity was not proven to be criminal nor part of any conspiracy to violate any federal law. There was nothing inherently factually illegal for the appellants to have obtained their legal share of business referred to Terminal and the law has yet to brand unlawful the receipt of a percentage of business referred to another, particularly when the recipients of the funds are in fact the owners of the income-producing property.

(b) There was a total and obvious failure to prove that through a pattern of racketeering activity, as defined by the statute, the appellants acquired and maintained an interest in and control of the business assets and contractual rights of Terminal. Again, as in (a) above, the appellants' conduct and actions at best evidenced a connection with those accounts which had been transferred to Terminal in a legal transaction which did not in any way affect the other stops previously held or acquired by Terminal. The proof showed unequivocally that Conti was interested only in receipts from those stops transferred to Terminal when Yellow Bird failed to acquire its own license. Further, Conti would segregate

and hold only those remittances which applied to those transferred accounts and in no way did he appropriate any funds which emanated from other businesses held or maintained by Terminal.

(c) As to the third facet of this alleged conspiracy, there was again a total failure of proof that there was any conspiracy to control refuse removal not only in Co-op City, but, as the indictment charges, in "other areas" of the Bronx. Here the government failed to produce any proof save the 1969 Mongelli incident, which could by any stretch of the imagination be construed as a design to keep others out of Co-op City. Co-op City City was built at or about that time and as the testimony clearly showed at the trial, private sanitation men gravitated to specific areas, mainly for economic and efficiency reasons, and not one witness was placed on the stand who told the court that they had attempted to work Co-op City and were forced out by the defendants because of a design to maintain control of that area. Similarly there was no proof that the appellants had a plan to control the garbage removal outside of Co-op City.

(d) Finally, there is a blatant failure of proof that the appellants conducted and participated in the business of P & S through a pattern of racketeering activity. P & S did not come into being until late 1975 and the government produced not one iota of proof that the appellants operated that enterprise through activities which the statute brands

as a pattern of racketeering activity. Significantly there was no proof that any force or violence was employed in P & S requiring the Co-op City stops from Terminal.

The common thread in the four instances cited above is the pattern of racketeering activity. Under the definition provided by statute (i.e. two acts within ten years which violate specified sections of federal criminal law), the government was obliged to prove that the conspiracy either envisioned the performance of certain specified acts or did, in fact, bring to fruition the violation outlined by the statute. We submit the government's proof, totally failed to show that there was any nexus between certain isolated acts and a conspiracy to achieve the purposes that the indictment ascribes to those acts.

Count 2 separately states the charge in the first two sections of the conspiracy count as a substantive act, namely the acquisition and maintenance, through a pattern of racketeering activity, of an interest in and control of Terminal and its business assets and contractual rights, including acquisition of an interest in and control of "all customers for whom Terminal Sanitation had performed garbage collection services." Again we submit the proof failed to show any acquisition and maintenance of an interest in and control of Terminal other than the appellants' own legal interest in the accounts which it had transferred to Terminal pursuant to written contract. There was a total failure of proof to show

any connection with customers other than those specifically transferred stops. Certainly the government did not even attempt to show any interference by the appellants with "all customers" of Terminal, and thus Count 2 similarly must fall.

POINT 2

THE GOVERNMENT FAILED TO ESTABLISH
AN ESSENTIAL ELEMENT OF THE HOBBS
ACT TO PERMIT A CONVICTION UNDER
COUNT 3.

The appellants' convictions under Count 3 of the indictment must be reversed. Count 3 charged that Conti and Gambino, in violation of 18 U.S.C. §1951, from March 1, 1972 to December, 1975:

"did obtain monthly payments of money from Peter Darminio, Anthony Darminio and Terminal Sanitation ..."

It was further alleged that this violation was achieved "by means of extortion." Under the Hobbs Act:

"(2) The term 'extortion' means the unlawful taking or obtaining of personal property from the person or in the property of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking of obtaining."

According to the initial agreement between Yellow Bird Carting and Terminal Sanitation, Gambino was to receive 1/3 of the gross monthly receipts from the collection of the old Yellow Bird stops. At no time did the Darminios consider these stops to be theirs. Rather, they both testified that the stops at all times belonged to Gambino (Tr. 445, 456, 563). In order for the court below to have found the appellants guilty under Count 3, the extortion and each of its elements had to be proved. Stirone v. United States, 361 U.S. 212,

80 S.Ct. 270, 4 L.Ed.2d 252(1960); United States v. Provenzano, 334 F.2d 678 (3rd Cir. 1964), cert. den. 379 U.S. 947, 85 S.Ct. 440, 13 L.Ed.2d 544; United States v. Nadaline, 471 F.2d 340 (5th Cir. 1973), cert. den. 411 U.S. 951, 93 S.Ct. 1924, 36 L.Ed.2d 414.

The government's case significantly failed to prove the extortion element. How can a person violate the Hobbs Act in demanding the payment of money which rightfully belongs to him? Obviously he cannot. Nor could Conti be convicted under 18 U.S.C. §1951 for acting on behalf of Gambino to obtain the latter's money and/or property. The government failed to prove that the appellants forced the Darminios or Terminal to part with their property. Thus Count 3 must fail. United States v. Nakadalski, 481 F.2d 289 (3rd Cir. 1973), cert. den. 414 U.S. 819, 94 S.Ct. 42, 38 L.Ed.2d 51. Extortion has not been extended to include the obtaining of one's own property. Extortion requires an intent to obtain that which in justice and equity the party is not entitled to receive and does not extend to the use of force to obtain that to which a person is legally entitled. United States v. Enmons, 410 U.S. 396, 93 S.Ct. 1007, 35 L.Ed.2d 379 (1973).

Furthermore, the government did not prove that the appellants' collection of sums of money from Peter Darminio had a causal effect on the interstate commerce which Terminal was engaged in. The proof at trial clearly showed that Peter and Anthony Darminio were heavily in debt to others besides

Gambino and that the brothers voluntarily elected to sell stops in order to keep themselves going. Peter Darminio's outrageous life style and Anthony Darminio's hunger for drugs were the motivating factors in their repeated trips to the loan sharks. There was not one word of testimony in the record that either appellant told the Darminios that they would have to sell or dispose of any stops to pay the alleged indebtedness to Gambino. On the contrary, the \$90,000 loan, bounced checks to Conti, dishonored notes to Yellow Bird were not the subject of any threats and the Darminios so conceded. Assuming arguendo that Gambino wished to be paid the monies he had loaned to Darminio, a violation of the Hobbs Act is not spelled out in that it was the Darminios' choice to sell assets to pay their indebtednesses rather than the appellants' insistence that they do so. Thus, the conviction as to Count 3 must be reversed.

POINT 3

THE EVIDENCE WAS INSUFFICIENT TO
WARRANT A CONVICTION UNDER COUNT 4

With respect to Count 4 (18 U.S.C. §894) it is obvious that the appellants have suffered because of the total intermingling of facts and circumstances surrounding various borrowings by the Darminios. Appellants concede the statute is violated when one uses force or violence in an effort to collect an extension of credit. However, we submit that the proof on this count was insufficient to persuade the trier of the fact that in fact it was the appellants' actions, vis a vis the Darminios, which could be pinned to the use of violence to collect extensions of credit. In other words the testimony as to beatings and threats given by the Darminios standing alone obviously would not make out a case against the appellants since the Darminios, especially Peter, were the subject of constant manhunts by those to whom money was owed.

One specific instance was the breaking of Peter Darminio's arm by a loan shark not connected in any way with the defendants. A second incident was the conceded retreat to the subways seeking refuge from persons unconnected with the appellants. The logical corroboration here was Ralph Torres, and in that regard we submit that the Court erred in crediting the testimony of Torres for the specific acts which he recounted under oath. Torres, we submit, was and could not be in a position to supply the factual basis between what may have occurred during the long relationship between all the parties

and the specific prohibitions enunciated in §894. We are not saying that Torres did not observe altercations between the appellants and Peter Darminio, but we submit that Torres was in no position to know what these altercations concerned and thus the Court had no basis to cross the reasonable doubt line in using Torres as a corroborator of the clearly discredited Darminios.

For example both Peter and Anthony Darminio testified that each lied to the other. The government then produced Torres to testify as to what the Darminios told him were the circumstances surrounding certain specific acts. Why did the Darminio brothers tell Torres the truth when they lied to each other? It was clear that Torres had a bias and deep-seated hostility toward the defendants because of this notion that the defendants would secure payments before he would get paid for his labor. It is clear that the Darminios were "bad-mouthing" the appellants as an excuse for not paying Torres while they used his money to either gamble or buy drugs. This obvious hostility, we submit, was ignored by the court in crediting Torres' testimony. Furthermore, the court closed its eyes to the long-standing, often volatile, relationship between the appellants and the Darminios. If Gambino was the usurious extortionist the government contended he was, why did he loan Peter \$90,000 interest free? Why did he come to the aid of Anthony when Ettinger was about to foreclose on his house?

These are issues obviously resolved against the appellants, but which we maintain should have been resolved in their favor. Many people often have violent relationships with one another although those relationships are not necessarily criminal. Taking the entire scope of the relationships between the appellants and the Darminios, we submit that there was a failure of proof that the defendants acted toward their alleged victims with criminal intent. We submit we have the classic example of a Hatfield-McCoy relationship, where the government has succeeded in turning one side of the feud against the other and convincing a trier of the fact that there was mens rea on one side, but yet not on the other. We submit that the Court should vacate its finding of guilt and enter an acquittal on this count.

In addition, there was no testimony that the alleged beatings were as a result of Peter Darminio's failure to satisfy credit obligations. They could have been for any number of things. This was particularly underscored by the volatile and often contradictory relationship between the Darminios and the appellants.

POINT 4

THERE WAS INSUFFICIENT CORROBORATION
OF THE DARMINIOS' TESTIMONY TO SUS-
TAIN APPELLANTS' CONVICTIONS AS TO
COUNTS 1-4.

On at least two occasions Judge Ward commented that the testimony of the Darminios, standing alone, would have been insufficient to sustain appellants' convictions on Counts 1-4. (Tr. 2922, 3066) Thus he was required to base the convictions of assertedly corroborative testimony as he found to be contained in the testimony of Ralph Torres and in Government Exhibit 12, an alleged list of Peter Darminio's obligations to Joseph Gambino partially in Gambino's handwriting.* We submit that even accepting this evidence as true, it was insufficient to corroborate the Darminios' testimony and result in proof beyond a reasonable doubt.

Without Ralph Torres, the government simply had no case against the appellants. Judge Ward so determined both

* We will not analyze Government Exhibit 12 separately as Judge Ward only found that corroborative of the tax evasion charges (Tr. 3067). However, we submit that this alone was insufficient to establish tax evasion. The loans were interest free, and the mere fact that at some point Gambino had loaned this money to Peter Darminio did not establish that it came from taxable sources. In rejecting Darminio's testimony, the Court should not have found that Government Exhibit 12 was sufficient corroboration as to the tax counts.

during the trial and at the time of sentencing. As to Joseph Gambino, Torres was unable to hear the conversations of Peter Darminio and Joseph Gambino, and so stated on several occasions (Tr. 607, 608, 611, 612). He never saw Peter give Gambino or Conti any money (Tr. 857) and never saw Darminio slapped by Gambino (Tr. 905). Although he recounted several assaults and/or threats by Conti, it was never clear that these related to any changes in the indictment, particularly in view of the fact that Torres, as had all other witnesses, testified that the Co-op City stops were neither Terminal's nor the Darminios' but rather belonged to Gambino (Tr. 622, 732). In fact, Torres admitted that even Conti was aware of the distinction between the original Terminal stops and the former Yellow Bird customers (Tr. 636) to such an extent that he would only take the checks from the Yellow Bird stops, leaving Terminal's alone (Tr: 734-735).

Torres admitted on several occasions that other people, besides Conti, were always looking for Peter Darminio (Tr. 765). The reason for this was Darminio's constant debts and his repeated failure to pay (Tr. 915). Although Darminio's arm was broken by a creditor, Torres admitted that neither Gambino nor Conti were involved (Tr. 915) and that Darminio was hiding from everyone (Tr. 915).

Unquestionably Torres did not corroborate the Darminios as to the charges alleged in the indictment. There was no showing of a conspiracy between Conti and Gambino.

Furthermore, the only property which Torres could say Conti ever evinced an interest in was the old Yellow Bird route in Co-op City which, he confirmed, never belonged to Terminal or the Darminios. Thus his testimony was of no aid to the government on Count 2 or Count 3 (Ricco or Hobbs Acts). As to any corroboration on the \$894 charge (Count 4), Torres' testimony fails to reveal if the alleged payments to the appellants by Peter Darminio were for extensions of credit or as the 1/3 monthly use payment on the Yellow Bird stops. Without more it would be difficult to say that Torres corroborated the violations of the law as charged in the indictment, and certainly did not aid in proving the government's case beyond a reasonable doubt.

POINT 5

THE CONTRIVED JURISDICTION OF THE
GOVERNMENT PROHIBITS THE CONVICTION
OF CONTI UNDER COUNT 5.

In September, 1976, American Automated Refuse & Waste Paper Removal was formed by agents of the Federal Bureau of Investigation (Tr. 1339) after obtaining the necessary equipment, American ostensibly began to engage in the rubbish removal business. One of the stops which American solicited was Harry's Service Station in the Bronx. At this time Harry's was being serviced by P&S Sanitation. The purpose for which American Automated was organized was solely to gather evidence against the appellants by causing a confrontation with Conti (Tr. 1520). In fact, the agents on the case were very concerned with establishing the interstate commerce element as required by 18 U.S.C. §1951 (Tr. 1508-1509).

Unquestionably, American Automated was created solely for the purposes of inducing Conti to violate the Hobbs Act. It is extremely reprehensible that the government should be permitted to fabricate the jurisdictional prerequisite necessary for the Hobbs Act. There was no intent to establish American Automated as a commercial enterprise but only as an investigative tool (Tr. 1375).

American lost money every month (Tr. 1400). It solicited Harry's Service Station although it knew P&S was servicing it (Tr. 1387). In fact, it never even picked up garbage there (Tr. 1391), and went out of business soon after the Conti-Orrell confrontation (Tr. 1397). Furthermore,

without the intercession of the F.B.I., American would not have even been licensed by the Department of Consumer Affairs of the City of New York (Tr.1537-39). Even assuming that the minimal and intentional contacts with interstate commerce were sufficient to bring American Automated within interstate commerce, the contrived jurisdiction prevents any conviction under Count 5.

As this Court held in United States v. Archer, 486 F.2d 670, 682 (2nd Cir. 1973):

"Our holding is rather that when Congress responded to the Attorney General's request to lend the aid of federal law enforcement to local officials in the prosecution of certain crimes, primarily of local concern, where the participants were engaging in interstate activity, it did not mean to include cases where the federal officers themselves supplied the interstate element and acted to ensure that an interstate element would be present. Manufactured federal jurisdiction is even more offensive in criminal than in civil proceedings, cf. 28 U.S.C. §1359. As the late Judge Freedman said with respect to civil actions in McSparran v. Weist, 402 F.2d 867, 873 (3rd Cir. 1968) (en banc), cert. denied, 395 U.S. 903, 89 S.Ct. 1739, 23 L.Ed.2d 217 (1969), manufactured jurisdiction 'is a reflection on the federal judicial system and brings it into disrepute.'"

With the great hue and cry which has recently been raised over prosecutorial involvement in criminal activity, this Court is presented with the unique opportunity to preserve the concept of true federal jurisdiction. As this Court has noted:

"We have been told by the Supreme Court that extension of federal criminal jurisdiction but must clearly be expressed in the statute. baugh v. United States, 409 U.S. 239, 93 S.Ct. 477, 34 L.Ed.2d 446 (1972); United States v.

404 U.S. 336, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971); Rewis v. United States, 401 U.S. 808, 91 S.Ct. 1056, 28 L.Ed. 493 (1971). See United States v. Archer, 486 F.2d 670 (2nd Cir. 1973)." United States v. Sabatino, 485 F.2d 540, 543 (2nd Cir. 1973).

"A casual and incidental occurrence," United States v. Corallo, 413 F.2d 1306, 1325 (2nd Cir. 1969), or "a matter of happenstance," Rewis v. United States, 401 U.S. 808, 812, 91 S.Ct. 1056, 28 L.Ed.2d 493 (1971) should not be employed to create federal jurisdiction where none exists, particularly where, as here, the government consciously and intentionally supplied the jurisdictional element.

POINT 6

CONTI'S CONVICTION UNDER COUNT 5
MUST BE REVERSED IN THAT ACTUAL
FEAR IN THE MIND OF THE VICTIM
MUST BE PROVED AS AN ESSENTIAL OF
THE HOBBS ACT VIOLATION.

Any analysis of the essential elements of a violation of the Hobbs Act (18 U.S.C. 1951) must, perforce, begin with the statute itself. That statute states, in relevant part:

(a) "Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce by ... extortion ... or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be ..."

(b) As used in this Section --

"(2) The term 'extortion' means obtaining the property from another, with his consent, induced by wrongful use of ... fear."

A reading of the statutes makes it crystal clear that fear is an essential element of the offenses charged. As noted by Judge Gurfein in United States v. Brecht, 540 F.2d 45 (2nd Cir. 1976):

"The cases interpreting the Hobbs Act have repeatedly stressed that the element of 'fear' required by the Act can be satisfied by putting the victim in fear of economic loss."

Similarly, in Nick v. United States, 122 F.2d 660, 671 (8th Cir., 1941), the Court of Appeals held:

"The gist of the unlawful act is extortion. Extortion involves a state of mind as an element of the offense under the act. Unless there is some form of compulsion, there is no crime under this act. If exhibitors had paid money of their own initiative and voluntarily, there would have been no violation of the act. It was therefore essential to show that such payment was under such compulsion. "

Moreover, it has been held that the victim's fear must be a reasonable one. See United States v. Billingsley, 474 F.2d 63, 65 (6th Cir., 1973); United States v. Tropiano, 418 F.2d 1069 (2nd Cir., 1969); Carbo v. United States, 314 F.2d 718 (9th Cir., 1963). Both the Tropiano and Carbo decisions rest upon the fact that "extortion is an essential element of the Hobbs Act; and to prove extortion, it is essential to show that there was a generation of fear in the victim. See also, United States v. Tolub, 309 F.2d 286, 288-289 (2nd Cir. 1962).

Thus the element of "fear" that the government must prove is twofold:

1. That the alleged extortor possessed the power to induce the fear; and
2. That the alleged victim was, in fact, placed in fear.

This Court has recognized this dual requirement in approving the language of a charge of the Hon. Jack B. Weinstein in United States v. Brecht, supra, in which Judge Weinstein properly charged the jury that they could find the required element of fear if the evidence showed "a state of anxious concern, alarm, apprehension of anticipated harm to the business or a threatened loss to the business." See also, United States v. Tropiano, supra, 418 F.2d at 1081, in which it was held:

"In order to establish a Hobbs Act extortion the government was compelled to show that the property was extorted by threatened violence or fear. Thus fear was one of the elements of the offense ..."

As the Supreme Court observed in United States v. Local 807, 315 U.S. 521, 533 (1941):

"This (the government's) objection mistakes the significance of this requirement of proof (of fear) in the case of robbery. Its true significance is that it places an added burden upon the prosecutor rather than upon the accused. That is, the prosecutor must first establish a criminal intent upon the part of the defendant and he must then make a further showing with respect to the victim's state of mind. The effect of this rule is to render conviction of robbery more rather than less difficult."*

In the instant case, the evidence showed that American Automated was, in fact, an agency of the United States government. As such, we submit, it was utterly impossible for American Automated and/or its agents to possess the subjective state of mind evincing fear which is, as the cases hold, an indispensable element of proof in a Hobbs Act prosecution.**

* Although the specific holding of United States v. Local 807 was sought to be repudiated by passage of the Hobbs Act, the above language was in no way repudiated and as can be seen from the cases cited above, is still good law.

** The fact pattern herein, of course, is readily distinguishable from a situation in which a legitimate businessman is approached by an extortioner and the businessman then proceeds to cooperate with the authorities.

The instant fact pattern is also distinguishable from the recent "entrapment cases" decided by the United States Supreme Court.

CONCLUSION

For the aforementioned reasons, it is respectfully submitted that the judgments of conviction rendered herein should be reversed.

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Respectfully submitted,

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